It would suffice if we were to say that in our view, the word "trial" in O. 35 r. 11 in connection with which there is "evidence already recorded", should be given the meaning given to it in another context, in *Wozniak* v. *Wozniak*[3] wherein Denning L.J. held that a trial means the final determination of the main suit and not determination of any interlocutory application therein.

In other words, Order 35 rule 11 does not apply to interlocutory proceedings and a judge has absolute discretion to complete the hearing of any interlocutory matter and make an order, or leave it to another judge to hear submissions *de novo* and make a decision thereon.

We therefore overrule the preliminary objection lodged by S. Devi.

Order accordingly.

Solicitors: *N. Saraswathy Devi; Shook Lin & Bok.*

PEMUNGUT HASIL TANAH, DAERAH BARAT DAYA, PULAU PINANG v. ONG GAIK KEE

[F.C. (Wan Suleiman, Salleh Abas & Abdul Hamid F.JJ.) August 16, 1982 & March 19, 1983]

[Ipoh – Federal Court Civil Appeal No. 271 of 1981]

Administrative Law – Land Acquisition – Delay in holding inquiry and making award – Injustice done to landowner – Whether acquisition done in accordance with the law – Whether application for certiorari can be made – Land Acquisition Act, 1960, ss. 8, 10 and 68 – Interpretation and General Clauses Ordinance, 1948, s. 38 – Federal Constitution, art. 13.

Constitutional Law – Rights of property – Land Acquisition – Delay in holding inquiry and making award – Federal Constitution, art. 13.

Land Law – Land Acquisition – Delay in holding inquiry and making award – Doctrine of exhaustion – Injustice done to landowner – Whether requisition done in accordance with law – Land Acquisition Act, 1960, ss. 8, 10 & 68 – Federal Constitution, art. 13.

In this case the Penang State Authority made a declaration on April 25, 1974 under section 8 of the Land Acquisition Act, 1960, for the acquisition of an area of land for a public purpose. By another *Gazette* Notification dated December 20, 1979 the State Authority made a declaration that an area of the said land together with some other lands was needed for a public purpose. An inquiry was held and compensation awarded for this land. On November 5, 1980 the Collector issued a notice that he would hold an inquiry in respect of the original piece of land. The inquiry was held despite the objection of the respondent and an award made. The respondent applied for an order of certiorari to quash the inquiry and the award. Mustapha Hussain J.C. allowed the respondent's application. He held that the doctrine of exhaustion of an earlier declaration by a subsequent one applied in this case and that there was injustice caused to the landowner by the delay in holding the inquiry under section 10 of the Act and the making of the award. The appellants appealed.

Held: (1) the doctrine of exhaustion is not applicable as both declarations were declarations under section 8 of the Land Acquisition Act, 1960;

(2) the constitutionality of the Land Acquisition Act is not in issue in this case and no challenge was made against the Act for not providing adequate compensation or in any way being contrary to Clause (2) of Article 13 of the Federal Constitution;

(3) the Collector's delay in holding the inquiry under section 10 of the Land Acquisition Act, 1960, seven years after the declaration of acquisition resulting in an inadequate compensation to the respondent brings the inquiry and the award outside the purview and scope of the Act. In view of the long delay resulting in injustice to the landowner, the acquisition was not done in accordance with the Act and the learned Judicial Commissioner was correct in ordering the issue of an order of *certiorari* to quash the acquisition proceedings.

Cases referred to:

(1) *State of Madhya Pradesh & Ors.* v. *Vishnu Prasad Sharma & Ors.* A.I.R. 1966 S.C. 1593.

(2) *Superintendent of Lands and Surveys, Fifth Division, Limbang* v. *Lim Teck Hoo & Anor.* [1980] 1 M.L.J. 58.

(3) *Associated Provincial Picture Houses Ltd.* v. *Wednesbury Corporation* [1948] 1 K.B. 223.

(4) *Reg.* v. *St. Albans Crown Court, ex parte Cinnamond* [1981] Q.B. 480.

(5) *Reg.* v. *Tottenham Justices, Ex parte Dwarkados Joshi* [1982] 1 W.L.R. 631.

(6) *Rex* v. *London County Council; Ex parte Swan and Edgar (1927) Ltd.* (1929) 141 L.T. 590.

FEDERAL COURT.

Mohamed Saari bin Yusof (Legal Adviser, Penang) for the appellants.

R. Rajasingam (*Balwant Singh* with him) for the respondent.

Cur. Adv. Vult.

Salleh Abas C.J. (Malaya) (delivering the Judgment of the Court read by Edgar Joseph Jr. J.) The issue involved in this appeal concerns the legality of the acquisition of a piece of land comprising Lot 532 in Mukim 12, South West District of Penang. The land is part of the estate of one

Ong Joo Sun (deceased) and has a total area of 42 acres, 3 roods and 35 poles.

On April 25, 1974 by *Gazette* Notification No. 103 of 1974 the Penang State Authority made a declaration under section 8 of the Land Acquisition Act, 1960 (the Act) to the effect that the whole area of this land together with six other pieces of lands specified in the Notification was needed for –

"Public, Industrial, Residential, Commercial and Agricultural Purposes to wit for land development and utilisation, resettlement of squatters, housing, institutional and recreational amenities in relation to integrated urban development and matters connected therewith."

Nothing was done in regard to this declaration until seven years later, when on June 15, 1981 an inquiry under section 10 of the Act was held and on July 7, 1981 an award of $1,117,418.50 calculated at the rate of 60 cents per square foot was made. The award was based on the valuation by the Government Valuer as to the market value of the land on the date of the G.N. 103/74 in compliance with paragraph 1(1) of the First Schedule to the Act.

However, before the aforesaid inquiry was held, Penang State Authority by another *Gazette* Notification, i.e. G.N. 884/79 dated December 20, 1979, made another declaration under section 8 of the Act in respect of this land to the effect that an area of 0.2151 acre, i.e. 9,369 square feet of it together with some other lands stated in the *Gazette* Notification was needed for public purpose, namely "Penang Island Traffic Dispersal – Package II". Inquiry under section 10 of the Act in respect of the acquisition under this *Gazette* Notification was held about four months later, i.e. on April 24, 1980 and a sum of $28,109.27 for this small piece was awarded, the sum being calculated at $3.00 per square foot as the market value of it on the date of G.N. 884/79. There was no challenge to this award and we assume that it was fully accepted by the respondent.

Whilst the acquisition under G.N. 884/79 was waiting to be inquired into under section 10 of the Act, the Collector Daerah Barat Daya, Pulau Pinang, in reply to a letter by the respondent's solicitors, wrote a letter dated January 9, 1980 to the solicitors stating that action was being taken to withdraw the acquisition declared in G.N. 103/74, and after the award of $28,109.27 in respect of the acquisition under G.N. 884/79 was made the Collector wrote to the solicitors another letter dated June 11, 1980 stating –

"Tanah yang *bukan* dibawah G.N. 103/74 tindakan sudah diambil untuk membatalkan warta itu dan akan diwartakan tidak lama lagi."

(In respect of the land *not* under G.N. 103/74 action had been taken to cancel the Gazette Notification and this would be published soon."

Needless to say that this letter makes no sense unless the Collector meant to say that action had been taken to cancel the acquisition declared in G.N. 103/74. The word *"bukan"* meaning "not", must have been wrongly or inadvertently inserted, and therefore no effect should be given thereto because there was no question of the whole land not having been declared for acquisition under G.N. 103/74. The whole area was subject to G.N. 103/74. If the word "bukan" was not inadvertently inserted in, the reference to G.N. 103/74 is also meaningless unless it reads G.N. 884/79, so that the letter means to say that "in respect of the land not under G.N. 884/79 action had been taken to cancel the notification".

It is thus clear from these two letters that the intention of Penang State Authority up to June 11, 1980 was to withdraw from the acquisition of the whole piece of land except that portion which was gazetted for traffic dispersal and that the State Authority would soon publish a notification of the proposed withdrawal.

However, instead of withdrawing from the acquisition, on November 5, 1980 the Collector issued a notice under Borang E stating that he would hold an inquiry under section 10 of the Act on November 29, 1980 in order to determine the compensation to be awarded. The respondent, through her solicitors, objected to the holding of the inquiry – vide *OGK 2,* on the ground that any further proceedings would be null and void in view of the long delay and the Collector's letters referred to above. Despite the objection, on June 15, 1981 the Collector proceeded to hold the inquiry and on July 7, 1981 made the award of $1,117,418.50.

Aggrieved by the action of the Collector for proceeding to hold the inquiry and to make the award instead of proceeding to gazette the withdrawal of the State Authority from the acquisition, the respondent applied to the High Court, Penang by an Originating Motion for an order of certiorari to quash the inquiry and the award. Encik Mustapha bin Hussain, J.C., as he then was, heard this

motion and allowed the respondent's application. Hence this appeal before us by the Collector.

In his written judgment the learned Judicial Commissioner dealt with a number of issues, but the relevant issues so far as this appeal is concerned are the doctrine of exhaustion of an earlier declaration by a subsequent one and the injustice caused to the land owner by the delay in holding the inquiry under section 10 of the Act and the making of the award.

The doctrine of exhaustion was based upon the decision of the Indian Supreme Court in The *State of Madhya Pradesh & Ors.* v. *Vishnu Prasad Sharma & Ors.*[1] in that a preliminary declaration becomes exhausted or comes to an end when it is followed by a definite declaration. The learned Judicial Commissioner in the instant case held that the declaration published under G.N. 103/74 was exhausted by the subsequent declaration published under G.N. 884/79 and that being the case the subsequent inquiry and award could not therefore be valid. This is not the first time the doctrine was submitted to this court. It was submitted to the court in *Superintendent of Lands & Surveys, Fifth Division, Limbang* v. *Lim Teck Hoo & Anor.*[2] In that case the doctrine was rejected as being inapplicable. In my judgment, I expressed caution when dealing with a precedent taken from another jurisdiction. In any case in the present appeal both the declarations, published in G.N. 103/74 and G.N. 884/79, were declarations under section 8 of the Act. Thus even if the doctrine could be considered, this fact alone renders the case of *Vishnu Prasad Sharma* (*supra*) completely irrelevant and inapplicable. The learned Judicial Commissioner was completely misdirected on the fact when he said that there was a notification under section 4 of the Act. Be that as it may, we wish to reiterate here that the doctrine of exhaustion is not applicable.

The next relevant issue is the injustice caused to the landowner by the delay in holding the inquiry and the making of the award. Because the market value of the land has to be determined as the value prevailing on the date of the declaration – see paragraph 1(1) of the First Schedule to the Act – the effect of the delay is that the landowner has to be awarded on the date of the award the past value as on the date of the declaration without taking into account the increase in the price of the land and the effect of inflation which have occurred in the meantime. Thus the longer the delay in making the award is, the greater would be the injustice to the landowner. In this case the landowner was awarded in 1981 the market price of the land prevailing in 1974. The learned Judicial Commissioner questioned the reasonableness and the fairness of this award, and finally came to the conclusion that even if the doctrine of exhaustion is not applicable, certiorari could still lie because the delay resulted in an inadequate compensation to the landowner and such compensation is contrary to clause (2) of Article 13 of the Federal Constitution.

With respect we do not think that it is necessary to go so far as to invoke clause (2) of Article 13. This clause lays down the constitutional standard of an expropriatory law so that "no law shall provide a compulsory acquisition or use of property without adequate compensation". We do not think that the constitutionality of the Land Acquisition Act is an issue here. No challenge is made by any one against the Act for not providing adequate compensation, or in any way being contrary to this clause. This clause is therefore irrelevant for the purpose of this appeal.

We think that it is sufficient to decide this appeal on the basis of a simpler question, i.e. whether or not in view of the long delay resulting in an injustice to the land owner the acquisition was done in accordance with the law (the Land Acquisition Act). Only in the circumstance that it is not done in accordance with the Act can we say that the acquisition is contrary to the requirement of clause (1) of Article 13 of the Federal Constitution which requires that to be lawful every deprivation of property must be done in accordance with law.

Every exercise of statutory power must not only be in conformity with the express words of the Statute but above all must also comply with certain implied legal requirements. The court has always viewed its exercise as an abuse and therefore treats it as illegal where the exercise is done for an inadmissible purpose or on irrelevant grounds or without regard to relevant considerations or with gross unreasonableness (*de Smith's*, 4th Edition, p. 323; and *Associated Provincial Picture Houses Ltd.* v. *Wednesbury Corporation*.[3])

It is true that section 10 of the Act does not prescribe the time within which the inquiry into

the compensation must be held but looking at the Act as a whole no one could deny that the proceedings under the Act are meant to be in a continuous motion so that no such interruption or such undue delay or stoppage as to amount to an abandonment of the acquisition could be regarded as within this motion. Under section 38 of the Interpretation and General Clauses Ordinance, 1948 it is provided that –

"Where no time is prescribed or allowed within which anything shall be done, such thing shall be done with all *convenient speed* and as often as the prescribed occasion arises."
(emphasis is ours)

What then is the "convenient speed"? In our view it must be "as soon as possible" or "within a reasonable time", and not "as late as possible". Obviously what amounts to "convenient speed" must vary from case to case and in our judgment seven years delay is certainly not a "convenient speed" as it is so far outside the normal period of time that no reasonable authority could ever regard it as reasonable. That being the case the court is entitled to strike down the impugned acquisition proceedings as illegal. (*Regina* v. *St. Albans Crown Court, Ex-parte Cinnamond*[4] and *Regina* v. *Tottenham Justices, Ex-parte Dwarkados Joshi*[5])

The Collector may well have plenty of work and other duties to perform within the available time at his disposal, but he must consider not only the interests of the State of which he is an official, but also that of the land owners, whose land he is acquiring. He must therefore arrange his duties in such a way as not to neglect their interests altogether. Failure to do so, resulting in the diminution of their interests, in our view, amounts to an abuse of power, which entitles the land owners concerned to an order of certiorari. That the Collector is required to make an inquiry without much delay is clearly shown by paragraph 1(1) of the First Schedule of the Act itself. As this paragraph fixes the market value of the land as on the date of the declaration it is implicit that the Collector is under a duty to hold the inquiry within such time as would not render the market value of the land at the time of the award to be substantially different from that prevailing on that date of the declaration. If the delay in holding the enquiry in this case is allowed, paragraph 1(1) of the First Schedule would become an engine or a purveyor of injustice. Surely this was not the intention of the legislature. By providing no time limit within which the Collector should hold an inquiry the legislature leaves the discretion in the matter to the Collector,but it is certainly not its intention that the Collector shall be free to use it at any time he chooses to inquire at the expense of the land owner or regardless of his right. As demonstrated in this case, the Collector's delay in holding the inquiry under section 10 of the Act seven years after the declaration of acquisition resulting in an inadequate compensation to the respondent brings the inquiry and the award outside the purview and scope of the Act. Such delay tantamounts to an abuse of power and renders the inquiry and subsequent proceedings null and void. We therefore agree with the learned Judicial Commissioner's conclusion that an order of certiorari should be issued to quash the acquisition proceedings.

The learned Legal Adviser who appeared for the Collector submitted that the learned Judicial Commissioner erred in law in failing to consider section 68 of the Act. It is his contention that in view of section 68 which says:

"No suit shall be brought to set aside an award or apportionment under this Act."

the respondent's only remedy was only by way of reference to the High Court for determination of the market value of the land and that the Collector's award could not be impugned because of this section. The short answer to this argument is that the word "suit" in section 68 of the Act does not extend so as to include certiorari. (*Rex* v. *London County Council, Ex parte Swan and Edgar (1927) Ltd.*)[6]

For reasons given above, we are of the view that the decision of the learned Judicial Commissioner is correct. We therefore dismiss the appeal with costs and order that the deposit should be paid to the respondent on account of taxed costs.

Appeal dismissed.

Solicitors: *Balwant Singh & Co.*